



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 18, 2005

Ms. Hadassah Schloss
Open Records Administrator
Texas Building and Procurement Commission
P.O. Box 13047
Austin, Texas 78711

OR2005-01518

Dear Ms. Schloss:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 219007.

The Texas Building and Procurement Commission (the "commission") received two requests for the following information regarding Request for Proposals ("RFP") #303-5-10133: (1) bid tabulation for all proposals; (2) scoring evaluations of all proposals; (3) the list and value of accepted value engineering items; (4) the amount of the winning proposal; (5) notes of negotiation meetings with each bidder; and (6) any information used by the commission in reaching its final decision. You state that you are releasing information responsive to items 2 and 4 to one of the requestors.¹ You claim, however, that some of the requested information is excepted from disclosure under section 552.111 of the Government Code. You also assert that the remaining requested information may be excepted from disclosure under section 552.110 of the Government Code, but you make no arguments regarding the applicability of this exception. Instead, pursuant to section 552.305(d) of the Government Code, you have notified eight third parties of the requests and of their right to submit

¹ We note that Section 552.007 of the Government Code prohibits selective disclosure of information that a governmental body has voluntarily made available to any member of the public. Such information "must be made available to any person." *See* Gov't Code § 552.007(b). Therefore, as both requestors requested all scoring evaluations for RFP #303-5-10133, the commission must also release this information to the other requestor.

arguments to this office as to why the information should not be released.² See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have received correspondence from Kencon, Barecky, J.L., Brandes, and Austin Canyon. We have considered all submitted arguments and reviewed the submitted information.

Initially, we address the commission's claim of section 552.111 of the Government Code for the documents and audiotapes in Exhibit K. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.—Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5.

The commission raises section 552.111 with regard to the vendor evaluation sheets and BAFO presentation and negotiation audiotapes in Exhibit K. The commission asserts that the information in Exhibit K represents advice, opinion, or recommendations made during a decision-making process and that release of this information would hamper frank and open discussion during the decision-making process. Having considered these arguments, we conclude that the commission may withhold the information we have marked under section 552.111, as this information consists of advice, recommendations, and opinions reflecting the policymaking processes of the commission. The remaining information in Exhibit K does not constitute internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the

² The notified third parties are as follows: Kencon Constructors/Construction Managers, Ltd. ("Kencon"); STR Constructors, Ltd. ("STR"); Barecky Construction Company ("Barecky"); Browning Construction Company ("Browning"); J.L. Construction ("J.L."); Brandes Brothers Constructors, Inc. ("Brandes"); C.P. Snider Construction Company ("C.P. Snider"); and Austin Canyon Corporation ("Austin Canyon").

commission; therefore, this information is not excepted under section 552.111 of the Government Code and must be released to the requestor.

Next, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). Kencon, J.L., Brandes, and Austin Canyon have responded to the notice and state that they do not object to the release of their information; therefore, the submitted information pertaining to these companies must be released to the requestor. As of the date of this letter, C.P. Snider, Browning, and STR have not submitted any comments to this office explaining how release of the requested information would affect their proprietary interests. Therefore, these companies have provided us with no basis to conclude that they have a protected proprietary interest in any of the submitted information. *See, e.g.,* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Therefore, the submitted information relating to C.P. Snider, Browning, and STR is not excepted from disclosure under section 552.110 of the Government Code.

We now turn to the arguments submitted by Barecky. Barecky asserts sections 552.001 and 552.305 of the Government Code as exceptions to disclosure. We note, however, that these sections are not exceptions to public disclosure under the Act. Section 552.001 sets out the policy and construction of the Act. *See* Gov't Code § 552.001. Section 552.305 prescribes procedures under which a governmental body may decline to release requested information for the purpose of requesting an attorney general decision under section 552.301. *See* Open Records Decision No. 542 (1990) (addressing statutory predecessor to Gov't Code § 552.305).

Next, Barecky asserts section 552.104 of the Government Code. Section 552.104 excepts information from disclosure if a governmental body demonstrates that the release of the information would cause potential specific harm to the governmental body's interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). Section 552.104, however, is not designed to protect the interests of private parties that submit information to a governmental body. *See* Open Records Decision No. 592 at 8-9 (1991). In this instance, the commission has not argued that the release of the submitted information would harm the commission's interests in a particular competitive situation. Therefore, the proposal submitted by Barecky may not be withheld pursuant to section 552.104 of the Government Code.

Barecky also asserts that its information is excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects (1) trade secrets, and (2) commercial or

financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position on the application of the "trade secrets" component of section 552.110 to the information at issue, this office will accept a person's trade secret claim under section 552.110(a) if the person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.³ *See* Open Records Decision No. 552 at 5 (1990). However, we cannot conclude that

³ The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS, § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret. Open Records Decision No. 402 (1983).

Section 552.110(b) excepts from disclosure "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." Gov't Code § 552.110(b). An entity will not meet its burden under section 552.110(b) by a mere conclusory assertion of a possibility of commercial harm. *Cf. National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). The governmental body or interested third party raising section 552.110(b) must provide a specific factual or evidentiary showing that substantial competitive injury would likely result from disclosure of the requested information. *See* Open Records Decision No. 639 at 4 (1996) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure).

Based on Barecky's arguments and our review of the information at issue, we find that Barecky has established a *prima facie* case that information regarding its client list, which we have marked, is a trade secret for purposes of section 552.110(a); therefore, that information is excepted from disclosure. However, Barecky has not established a *prima facie* case that any of its remaining information is a trade secret; therefore, none of the remaining information pertaining to Barecky is excepted from release under section 552.110(a). Furthermore, we find that Barecky has not established that release of any of its information would likely cause substantial competitive harm to Barecky; therefore, none of the information pertaining to Barecky is excepted from release under section 552.110(b). *See* Open Records Decision Nos. 509 at 5 (1988) (stating that because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative); 319 at 3 (1982) (information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing are not ordinarily excepted from disclosure under statutory predecessor); *see generally* Open Records Decision Nos. 514 (1988) (public has interest in knowing prices charged by government contractors), 184 (1978). Accordingly, the commission may only withhold the marked client list in Barecky's proposal under section 552.110 of the Government Code.

We next address Barecky's claim that portions of its proposal are subject to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. *See* Gov't Code § 552.117(a)(1). Because Barecky's proposal does not include the home address, home telephone number, social security number, or family member information of any current or former government official

or employee, section 552.117 is not applicable in this instance. Thus, the commission may not withhold any information in Barecky's proposal pursuant to section 552.117 of the Government Code.

Barecky also claims section 552.128 of the Government Code. Section 552.128 provides as follows:

(a) Information submitted by a potential vendor or contractor to a governmental body in connection with an application for certification as a historically underutilized or disadvantaged business under a local, state, or federal certification program is excepted from [required public disclosure], except as provided by this section.

(b) Notwithstanding Section 552.007 and except as provided by Subsection (c), the information may be disclosed only:

(1) to a state or local governmental entity in this state, and the state or local governmental entity may use the information only:

(A) for purposes related to verifying an applicant's status as a historically underutilized or disadvantaged business; or

(B) for the purpose of conducting a study of a public purchasing program established under state law for historically underutilized or disadvantaged businesses; or

(2) with the express written permission of the applicant or the applicant's agent.

(c) Information submitted by a vendor or contractor or a potential vendor or contractor to a governmental body in connection with a specific proposed contractual relationship, a specific contract, or an application to be placed on a bidders list, including information that may also have been submitted in connection with an application for certification as a historically underutilized or disadvantaged business, is subject to required disclosure, excepted from required disclosure, or confidential in accordance with other law.

We note that the information at issue was not provided to the commission in connection with an application for certification as a historically underutilized or disadvantaged business under a certification program. Rather, Barecky submitted its proposal to the commission in connection with a specific proposed contractual relationship. We therefore determine that under these circumstances, the information submitted by Barecky is not excepted from disclosure pursuant to section 552.128. Consequently, the commission may not withhold any

portion of the proposal submitted by Barecky under section 552.128 of the Government Code.

Finally, we note that the submitted proposals include social security numbers that are excepted from disclosure pursuant to section 552.101 of the Government Code.⁴ Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision" and encompasses information that another statute makes confidential. Gov't Code § 552.101. A social security number may be withheld in some circumstances under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I). *See Open Records Decision No. 622 (1994)*. These amendments make confidential social security numbers and related records that are obtained or maintained by a governmental entity pursuant to any provision of law enacted on or after October 1, 1990. *See id.* The submitted information indicates that the commission obtained the social security numbers at issue pursuant to section 231.006 of the Family Code, which was enacted after October 1, 1990. Section 231.006 provides in pertinent part that "[a] bid or an application for a contract, grant, or loan paid from state funds must include the name and social security number of the individual or sole proprietor and each partner, shareholder, or owner with an ownership interest of at least 25 percent of the business entity submitting the bid or application." Fam. Code § 231.006(c). Thus, we determine that the commission maintains the social security numbers at issue pursuant to a provision of law enacted after October 1, 1990. Accordingly, we conclude that the submitted social security numbers, which we have marked, are confidential under section 405(c)(2)(C)(viii)(I) and must therefore be withheld pursuant to section 552.101 of the Government Code.

In summary, the marked information in Exhibit K may be withheld under section 552.111 of the Government Code. The marked client list in Barecky's proposal must be withheld pursuant to section 552.110(a) of the Government Code. The marked social security numbers must be withheld under federal law. The remaining submitted information must be released to the requestors.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by

⁴ This office will raise a mandatory exception like section 552.101 of the Government Code on behalf of a governmental body but ordinarily will not raise other exceptions. *Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987)*.

filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).


If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,


Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 219007

Enc. Submitted documents

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